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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

18 CR 262 (VEC)

5 FABIO SIMON YOUNES ARBOLEDA,

6 Defendant.

7 -----x
8 New York, N.Y.
9 November 17, 2020
12:40 p.m.

10 Before:

11 HON. VALERIE E. CAPRONI,

12 District Judge

13 APPEARANCES

14
15 AUDREY STRAUSS,
16 Acting United States Attorney for the
Southern District of New York

17 KYLE WIRSHBA
Assistant United States Attorney

18 DONALD YANNELLA
19 Attorney for Defendant

20 ALSO PRESENT: LISA CHAN, Pretrial Services
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1 (Case called)

2 MR. WIRSHBA: Good afternoon, your Honor. Kyle
3 Wirshba, on behalf of the government.

4 THE COURT: Good afternoon.

5 MR. YANNELLA: And for Mr. Younes, Donald Yannella.
6 Good to see you, your Honor.

7 THE COURT: Good afternoon, Mr. Yannella. Good to see
8 you.

9 Good afternoon, Mr. Younes.

10 THE DEFENDANT: Good morning.

11 THE COURT: Please be seated.

12 This is the first appearance of this defendant in this
13 case before me, so the new Rule 5(f) requires me to warn the
14 prosecutor of his *Brady* obligations.

15 So as I am required to do, I remind the government of
16 its obligations under *Brady v. Maryland* and its progeny to
17 disclose to the defense all information, whether admissible or
18 not, that is favorable to the defendant, material either for
19 guilt or punishment, and known to the government. The
20 government must make good-faith efforts to disclose such
21 information to the defense as soon as reasonably possible after
22 its existence becomes known to the government.

23 As part of these obligations, the government must
24 disclose information that can be used to impeach the trial
25 testimony of a government witness within the meaning of *Giglio*

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1 *v. United States* and its progeny, and must do so sufficiently
2 in advance of trial in order for the defendant to make
3 effective use of it at trial.

4 I remind you that these obligations are continuing,
5 and they apply regardless of whether you credit the
6 information.

7 For these purposes, the government includes any
8 federal, state, and local prosecutors, law enforcement
9 officers, and other officials who have participated in the
10 investigation of the events underlying the charges in this
11 case. It applies to anyone who has participated in the
12 prosecution of the charged offenses, whether such officials are
13 still part of the prosecution team or not, and that you have an
14 affirmative obligation to seek from those sources all
15 information that is subject to disclosure.

16 Finally, I caution the government that if it fails to
17 comply with this order, any number of consequences may follow.
18 I may order production of the information and specify the terms
19 and conditions of such production, or grant a continuance, or
20 impose evidentiary sanctions, or sanction any lawyer
21 responsible for the noncompliance, or dismiss charges before
22 trial, or vacate a conviction after trial or guilty plea, or
23 any other such order that is just under the circumstances.

24 Mr. Wirshba, do you understand these obligations and
25 confirm that you have fulfilled or will fulfill them?

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1 MR. WIRSHBA: Yes, your Honor. We understand the
2 obligations, we have and will fulfill them, and we take them
3 extraordinarily seriously.

4 THE COURT: Terrific.

5 Consistent with Rule 5(f), I have previously entered a
6 written order in this case confirming the government's *Brady*
7 obligations.

8 So the next step is to arraign Mr. Younes.

9 Mr. Younes, have you seen a copy of the indictment in
10 this case, which is numbered 18 CR 262?

11 THE DEFENDANT: (In English) Yes.

12 THE COURT: Has someone read the indictment to you?

13 THE DEFENDANT: When I came to this country?

14 THE COURT: Yes.

15 THE DEFENDANT: Yes.

16 THE COURT: Can you read English?

17 THE DEFENDANT: My English is broken. I speak a
18 little English.

19 THE COURT: Do you read English?

20 THE DEFENDANT: Yes.

21 THE COURT: Okay. Has someone read the indictment to
22 you?

23 MR. YANNELLA: Judge, may I make a record?

24 THE COURT: Sure.

25 MR. YANNELLA: I wasn't --

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1 THE COURT: Do you want to pull the mic closer to you?

2 MR. YANNELLA: Oh, yes. I had moved it when we were
3 talking earlier.

4 I wasn't the CJA attorney at presentment; I was
5 substituted in because that attorney was leaving the panel.

6 THE COURT: Okay.

7 MR. YANNELLA: So I have not formally reviewed the
8 indictment with my client, although I did discuss with him the
9 nature of the charges. I think that the former CJA attorney,
10 at presentment, discussed the indictment with Mr. Younes, and
11 he came here on extradition proceedings from Colombia, but I
12 just want to make a record that I haven't done what I would
13 normally do in a case.

14 THE COURT: Okay.

15 MR. YANNELLA: I assumed he got arraigned when he got
16 presented, but, apparently, that is not the case. I'm sorry.

17 THE COURT: I'm not sure if he has been arraigned, but
18 I'm going to arraign -- I see my clerk shaking her head, so I
19 think the answer is no.

20 Mr. Younes, you're charged in three counts. You're
21 charged with conspiracy to import cocaine into the United
22 States, and you're charged with two separate counts of
23 attempting to import cocaine into the United States.

24 Do you waive a public reading of the indictment?

25 THE DEFENDANT: (In English) Yes.

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1 THE COURT: How do you plead, guilty or not guilty?

2 MR. YANNELLA: Not guilty.

3 THE DEFENDANT: Not guilty.

4 THE COURT: Mr. Wirshba, where are we on discovery in
5 this matter?

6 MR. WIRSHBA: Your Honor, the government has produced
7 discovery to other defendants in this matter, and so already
8 has much of it prepared. The government would request two
9 weeks to produce discovery in this matter. There are certain
10 items of individual discovery that the government is
11 collecting. I have spoken with defense counsel, and we believe
12 we will be able to make that production within two weeks. Some
13 of the data that needs to be produced may be housed in Miami,
14 and so we will work to get that expeditiously. That's where
15 the agents are in this case.

16 If it is the case that the government requires
17 additional time than those two weeks, I'll speak with defense
18 counsel, and we'll, of course, make an application to the
19 Court.

20 THE COURT: Great. So discovery is due within two
21 weeks.

22 What's the story on the defendant,
23 Mr. Hernandez-Solarte, is he pending extradition?

24 MR. WIRSHBA: He is not pending extradition, your
25 Honor. He is at large, potentially in Colombia, potentially in

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Venezuela.

THE COURT: Okay. Because he's at large, the Speedy Trial Clock is not yet running.

MR. WIRSHBA: Correct, your Honor.

THE COURT: I'm assuming the government is still endeavoring to find Mr. Hernandez?

MR. WIRSHBA: We most certainly are, your Honor. He's indicted in several cases.

THE COURT: Okay.

So what I've got scheduled in this case is a status conference for December the 4th, at 2:00 o'clock. So we'll proceed with that status conference. That was previously scheduled with the codefendant, Mr. Gomez, I believe. So we'll proceed with that on December the 4th, at 2:00 o'clock. That will likely be a telephone conference; in fact, it will most assuredly be a telephone conference.

Mr. Yannella, you're going to need to talk to your client and see if he will waive his personal appearance for that status conference. If he doesn't want to waive appearance, I'm happy to bring him in. I think he's up at Westchester, so that won't trigger a quarantine for him, depending on what's happening in the world of COVID at that point. But my plan is to do a telephone conference if he's amenable to not being present.

MR. YANNELLA: Judge, I will review that with him

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1 prior to December 4th and advise the Court.

2 THE COURT: Perfect. Okay.

3 Mr. Yannella, I understand that you want to make a
4 bail application?

5 MR. YANNELLA: Yes, your Honor.

6 THE COURT: You have the floor.

7 MR. YANNELLA: Okay.

8 Your Honor, I understand that it's a presumption case,
9 but I would respectfully submit that, given the unusual
10 circumstances of this case, the defense can overcome the
11 presumption.

12 First of all, he's 71 years old. He primarily speaks
13 Spanish, although he speaks broken English.

14 If he were to be released, I would propose that he be
15 permitted to live in Orlando, Florida, with one of his two
16 daughters who live in the United States. I have provided
17 information about the two daughters, who are also two potential
18 cosigners, to the U.S. Attorney's Office last Friday. One of
19 the daughters earns \$55,000 per year, and she works at a
20 company called Ventsu, V-e-n-t-s-u, and the other daughter
21 earns \$45,000 per year, and she works at a company called
22 Mastec, M-a-s-t-e-c. If he were to be released, my client
23 would propose to live with the second of the two daughters, the
24 one who works at Mastec, M-a-s-t-e-c. That daughter's name is
25 Kathryn Younes, that's Kathryn K-a-t-h-r-y-n. She owns her own

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1 home in Florida. She's married. She and her husband are
2 willing to have Ms. Younes' father come live with them during
3 the pendency of the case. They have approximately \$120,000
4 equity in their home.

5 The other daughter does not own a home, but she's the
6 one who earns slightly more money. Her name is Paola,
7 P-a-o-l-a, Younes. She's the one who earns \$55,000 a year at
8 Ventsu. So what I'm proposing is that he be released on the
9 signature of those two cosigners, and that he be permitted to
10 live, perhaps in home detention, at Kathryn Younes' home in
11 Orlando, Florida.

12 This appears to be a somewhat complicated case. I
13 haven't received discovery yet, but I have read the press
14 release from the U.S. Attorney's Office from two years ago. It
15 involves FARC, it involves narcotic trafficking. My client is
16 an individual who has no prior record, either in the United
17 States or in Colombia. He's 71 years old. He worked not as a
18 licensed attorney in Colombia, but he worked in some capacity
19 doing legal work in Colombia. I don't know how it translates
20 exactly because I'm not familiar with the bar requirements down
21 there, but he worked in some capacity in Colombia.

22 There is a lot to discuss here. He's an individual
23 with health problems. As indicated in the pretrial services
24 report, he has some kind of blockage involving his heart and
25 involving an artery. If he were to get COVID-19, it's

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1 potentially catastrophic for him, if not fatal.

2 Another issue that I would like to raise is that if he
3 were to be at the Westchester County Jail, it's going to be
4 exceedingly difficult for me to review discovery with him. And
5 let me explain the difference between the MCC and MDC as
6 opposed to the Westchester County Jail.

7 I've been trying very hard in the past week, since I
8 picked up two Spanish-speaking clients who had both been
9 extradited from Colombia, and both are housed at the
10 Westchester County Jail. I found out that they have a
11 videoconferencing system, which is apparently the best way for
12 attorneys to consult with their clients, and that's because
13 it's confidential. When you log onto it, it tells you, this is
14 for attorney-client conversations, it is not being recorded.
15 The problem with that is that you're not allowed to add a third
16 party to it. So what I had wanted to do was have a Spanish
17 interpreter somehow added to it, but I've been unable to do
18 that in the past four or five days. Electronically or
19 technologically, they just don't have the capacity to add the
20 third person, and because my client is a Spanish-speaker and
21 speaks only broken English, what I would need to do, based upon
22 my conversations with other CJA attorneys who have
23 Spanish-speaking clients current in the Westchester County
24 Jail, would be to do the videoconference, get an interpreter on
25 my mobile phone, and then hold the mobile phone up to my

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1 computer, so that the interpreter could translate. I'm told
2 the quality is very poor.

3 I did do three or four videoconferences in the past
4 week with my clients who are up there. There's very little
5 privacy at their end. In one instance, I had an interpreter --
6 no, not an interpreter, an inmate in the background who could
7 hear what was going on, and he came over and offered to
8 translate, and, of course, I refused to allow that to happen.
9 In another instance -- I can't remember if it was the same
10 client -- the inmates in the background were suggesting
11 questions for the inmate to ask me as a lawyer. So the
12 confidentiality -- and this is the good option. The only other
13 option -- and I have communicated directly with the staff at
14 the Westchester County Jail just to make sure I'm getting this
15 all right, I really tried very hard. The other option is to do
16 a collect phone call, which I don't mind doing a collect phone
17 call, but they're telling me it's only privileged if it goes to
18 my office, I can't use my mobile phone. Now, the phone call
19 would be ideal because I could get a Spanish interpreter on the
20 phone, do a three-way call, if I had some assurance that it was
21 privileged. Although I don't want to do that, I would do it in
22 these circumstances. That's how I would communicate with him.
23 But, essentially, I have to come to my office in Manhattan in
24 order to do that option, and I haven't been typically doing
25 that, and I probably won't in the months coming up. I will if

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1 I have to, but it really involves travel into Manhattan in
2 order to get a privileged call from my client.

3 So those are the two options. I don't know if the
4 Court has any influence over the Westchester County Jail. I
5 have raised this with Bobbi Sternheim, who communicates with
6 the courts regarding issues like this, and I've asked them to
7 raise this at the next meeting, but that's where we stand.

8 So the bottom line is, he's 71 years old, he has
9 health problems, we're probably not headed for a trial anytime
10 soon, because I have murder cases in this district with
11 detained clients, and I was in court yesterday, or virtually in
12 court yesterday, being told that I'm probably not getting a
13 trial date anytime soon. He's going to be detained for a long
14 time, most likely pending trial. This is much more difficult
15 than the average case as far as trial preparation, as far as I
16 can tell, although, of course, I'll learn more. There's every
17 indication that he has a safe and secure place to live. His
18 daughters will make sure he comes back to court. Your Honor
19 can use her discretion in determining the amount of the bond or
20 whether any security is necessary, but he's willing to consent
21 to home detention or even home incarceration in Florida.

22 Thank you.

23 THE COURT: Thank you, Mr. Yannella.

24 Mr. Wirshba?

25 MR. WIRSHBA: Your Honor, the government believes that

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1 detention is appropriate in this case. As Mr. Yannella
2 acknowledged, this is a presumption case. And, here, we have a
3 defendant who, in the government's view, is both a risk of
4 flight and a danger to the community.

5 I'll start with danger to the community. Your Honor
6 is aware of the facts of this case, as this is not the first
7 defendant to come before the Court.

8 THE COURT: No, but refresh my recollection about what
9 the actual evidence against Mr. Younes is.

10 MR. WIRSHBA: Yes, your Honor, of course.

11 The evidence against Mr. Younes will show at trial
12 that he participated in a series of meetings in which he agreed
13 with others to provide thousands of kilograms of cocaine,
14 sourced from the FARC, to an individual who claimed to be
15 representing the head of the Sinaloa Cartel.

16 As your Honor is aware, the FARC is a designated
17 terrorist organization, designated by the State Department, and
18 the individual with whom the defendant and others claimed to be
19 coordinating on behalf of the FARC is one of the codefendants,
20 who is Hernandez-Solarte, who's better known as Jesus Santrich.

21 THE COURT: And your information is that Hernandez is,
22 in fact, a member of the FARC?

23 MR. WIRSHBA: Your Honor, Mr. Hernandez-Solarte was a
24 leader of the FARC before there was a peace accord between the
25 FARC and the Colombian government. He wasn't on the highest

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1 governing body of the FARC; he was on the second highest
2 governing body. He participated in the negotiations with the
3 Colombian government. Ultimately, he was to be named a senator
4 in Colombia, but when this case came to light, he, as others
5 had in the FARC, who had already demobilized from the FARC,
6 chose to run, and he is currently at large, being sought by
7 both Colombian and U.S. authorities.

8 And I will mention, your Honor, that that individual
9 has also been named in another indictment, charging Nicolás
10 Maduro and others in the Venezuelan regime, of coordinating
11 with the FARC and transporting hundreds of thousands of
12 kilograms of cocaine.

13 THE COURT: I guess what I was trying to confirm was,
14 during the course of the meetings where they were -- where
15 Mr. Younes thought that he was brokering a cocaine transaction
16 between the FARC and the Sinaloa Cartel, the person he was
17 dealing with as the FARC representative was Mr. Hernandez, who
18 the government has reason to believe was, in fact, a member of
19 the FARC, as opposed to someone who was holding himself out as
20 FARC, but wasn't in fact?

21 MR. WIRSHBA: I see, your Honor. Yes, that is
22 absolutely correct.

23 THE COURT: Okay.

24 MR. WIRSHBA: And, your Honor, the defendant
25 participated in meetings in which thousands of kilograms of

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1 cocaine was discussed, and, ultimately, the defendant
2 participated in a meeting in which a sample of that cocaine,
3 five kilograms of cocaine, was provided to the purported
4 representatives of the Sinaloa Cartel, not the actual
5 representatives who were working on behalf of the government.

6 So, your Honor, this is extraordinarily serious
7 conduct as reflected in the charges. The evidence here is
8 exceptionally strong. This was a case in which the government
9 was using confidential sources and, therefore, was recording
10 many of these meetings, and so the evidence will show the
11 defendant participated in these meetings, and the jury will get
12 to hear his words as he participated and as he agreed to
13 conduct these transactions.

14 So, in a way, your Honor, the case is somewhat
15 complicated in that it touches on some interesting
16 international issues, but, in many ways, this case is simple –
17 it is a narcotics case in which the defendant agreed on tape to
18 send thousands of kilograms of cocaine to the United States,
19 and in doing so, violated the narcotics laws. So the defendant
20 is certainly a danger to the community.

21 With respect to risk of flight, your Honor, I believe
22 that that is really the basis that the government would
23 emphasize most to the Court. The basis for that is that the
24 defendant is not a citizen of the United States. Indeed, he
25 was not even a resident of the United States. The defendant

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1 was living in this country and left this country in 1991 to go
2 back to Bogotá, as reflected in the pretrial services report.

3 And, your Honor, it appears that at that same time,
4 the defendant, in 1991, was arrested for driving without a
5 license, I believe, and never showed up to court for that
6 citation, and that's on page 3 of the report. And, instead, he
7 left and went to Bogotá, where he then lived until he was
8 extradited just recently.

9 Your Honor, because he was extradited and was living
10 in Colombia up until his time coming back to this district,
11 it's the government's belief that there is an exceptionally
12 strong reason to believe that the defendant will do what he can
13 to depart this country and leave these charges unanswered in
14 this district. The reason for that is that the defendant has
15 no reason to stay here. If he were to ultimately be convicted,
16 he's facing the ten-year mandatory minimum sentence in this
17 case, and then he's facing deportation back to Colombia, where
18 he is a citizen.

19 So if the defendant stays to answer the charges here,
20 he would be doing so only to face a ten-year sentence and end
21 up in the same place he would be if he were to flee, which was
22 Colombia. It's the government's submission that there are no
23 ties to this community, the one in the Southern District of New
24 York, and while he does have family residing in Florida, he
25 will not be able to spend time with that family, whether he

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1 goes to jail first and then has to end up back in Colombia or
2 whether he simply flees to Colombia from the Middle District of
3 Florida.

4 And, your Honor, because it is a presumption case,
5 because the government believes the defendant is a danger to
6 the community and a risk of flight, we would submit that
7 detention is appropriate.

8 THE COURT: Mr. Yannella?

9 MR. YANNELLA: Judge, I would just point out that the
10 narrative given by the prosecutor doesn't say a whole lot more
11 than what is in the indictment, and that is that he --

12 THE COURT: Well, I disagree. In terms of the
13 strength of the case, there is a strong case because the
14 defendant is on tape negotiating huge kilograms -- that's the
15 government's case, I have to accept their proffer --
16 negotiating multi-thousands of kilograms of transactions of
17 cocaine from Colombia to the United States.

18 MR. YANNELLA: But without one example of what he
19 supposedly said. So we already knew coming in here, from the
20 indictment and the press release, that he was present at
21 meetings, and he supposedly agreed to import narcotics into the
22 United States, but in these types of cases involving law
23 enforcement and drug cartels in South America -- and I have been
24 involved in these cases before -- sometimes narcotics
25 transactions are discussed because there often is corruption

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1 either in law enforcement, or in the military, or among the
2 politicians, but that doesn't mean that every individual at the
3 meeting actually agreed to what was being said.

4 So we're being told that he attended the meeting, but
5 we don't know how many people were present at the meeting.
6 We're being told that he agreed or he negotiated, but we're not
7 being told what he said. So what I'm saying is that it doesn't
8 add a lot more. There are often potentially issues of
9 entrapment in cases like this, there are issues about whether
10 everyone who's present at the meeting really knowingly and
11 intentionally joined the conspiracy.

12 (Pause)

13 THE COURT: That may be, Mr. Yannella, but you're not
14 in a position at this point to proffer whether that's the case
15 in this particular case, right?

16 MR. YANNELLA: That's correct.

17 THE COURT: So what I've got is it's a presumption
18 case. Based on the government's proffer, it is a strong case.
19 We've got someone who is not a citizen and who's associated
20 with an organization that has more than the capacity to make
21 good on the bail if he were to jump bail.

22 MR. YANNELLA: But he'd be ruining the financial life
23 of his two daughters.

24 THE COURT: But he could make that up. I mean, he's
25 only ruining it to the extent that he doesn't pay whatever

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1 they've committed to pay. And someone who's brokering
2 thousands of kilos of cocaine has the capability of doing that.
3 All of his ties are in Colombia other than his daughters. His
4 brothers and sisters, his wife, right, everybody's in Colombia
5 except these two children?

6 MR. YANNELLA: Yes, the pretrial --

7 THE COURT: In '91, facing really minor charges,
8 unless there was something else going on that he was concerned
9 was going to come out by virtue of his being arrested for
10 driving without a license, he gave up permanent residence to
11 return to Colombia, which is --

12 MR. YANNELLA: That's correct, your Honor.

13 THE COURT: -- which is unusual.

14 MR. YANNELLA: Well, not necessarily. Some people are
15 from Colombia, and they embrace being from Colombia, and they
16 want to live there because their parents and other family
17 members are there.

18 THE COURT: Of course, but they don't usually go to
19 the trouble of getting a green card. That's my only point. In
20 my experience, it is unusual for someone, having jumped through
21 every hoop you've got to jump through to get a green card, to
22 give it up based on nothing that I can see other than a minor
23 arrest.

24 MR. YANNELLA: Okay, I understand your point now.

25 THE COURT: That's my only point.

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1 So, Mr. Yannella, I'm going to reject your motion for
2 bond without prejudice to re-up it if some of the things that
3 you've suggested, upon review of the evidence, you can proffer;
4 that is, yes, they have tapes, but my guy is sitting in the
5 corner saying nothing, or whatever, but for now, I don't think
6 you've overcome the presumption, which is, this man is a
7 foreign national, looking at a lot of time with very serious
8 charges, and limited ties to the U.S., and to the extent he
9 does have ties, based on the organization that he's associated
10 with, he could make good on any financial loss that he would
11 cause to his suretors. So those are my concerns. But, again,
12 this is without prejudice after you've actually had a chance to
13 look at the evidence.

14 As for all of the difficulties in consulting with your
15 client in Westchester, I guess what I'll ask you to do is this:
16 Continue to try to work through the problems, including with
17 the legal staff up in Westchester. I confess that without
18 having heard from them, it strikes me as peculiar that they're
19 unwilling to allow a telephone connection to an interpreter
20 when you're having a videoconference, because that would
21 certainly facilitate things. If you ultimately cannot work out
22 a workable solution with Westchester, let me know, and I will
23 direct that your client be moved from Westchester to either MCC
24 or MDC --

25 MR. YANNELLA: Thank you.

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1 THE COURT: -- where things are obviously easier, but
2 they have -- there are a whole other set of downsides to MCC
3 and MDC.

4 MR. YANNELLA: It seems to me a reasonable solution
5 would be to allow me to have a privileged phone call from my
6 mobile phone, and then I could bring the interpreter in --

7 THE COURT: Three-way them in?

8 MR. YANNELLA: Three-way the interpreter in, and we
9 could discuss the case.

10 THE COURT: See what you can do in working through
11 these problems with Westchester. That's a new one to me. I
12 had not heard that they're not allowing privileged calls other
13 than to a landline and an office.

14 MR. YANNELLA: Yes, I got that in an email from the
15 staff, but I will follow up by myself.

16 THE COURT: Okay.

17 Anything further from the government?

18 MR. WIRSHBA: Your Honor, I believe time is already
19 excluded to December 4th.

20 THE COURT: It's not even running. You've got a
21 fugitive.

22 MR. WIRSHBA: I'm sorry, yes, your Honor, right.
23 Which you covered at the beginning, yes, your Honor.

24 THE COURT: Anything further, Mr. Yannella?

25 MR. YANNELLA: Could I just speak briefly with my

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1 client when the court appearance is done?

2 THE COURT: Yes.

3 Could you leave him in the courtroom for just a
4 second?

5 Yes.

6 MR. YANNELLA: Thank you.

7 THE COURT: Okay. Thank you.

8 MR. WIRSHBA: Thank you, your Honor.

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